APPENDIX

Opinion of the Federal District Court in *Lucking vs. Delano*—United States District Court for the Eastern District of Michigan, Southern Division, Civil Action No. 1480—Sixth Circuit Court of Appeals Docket No. 8585, *Lucking vs. Delano*, 117 F. (2d) 159.

"The Court: Now, on the motion to dismiss, on the question of the sufficiency of the allegations of the complaint, I think, perhaps, however much I might feel inclined to agree with the position of the National Bank that the contract is valid, that it was not made without power to make it, and that the approval is a nullity because of lack of notice, and that the claim that the stockholders or depositors did not understand it because it was ambiguous, that it was not of such a nature as to be an approval of the contract—I say, however clear that position may be, it seems to me that there may be enough in the complaints as amended to show that the plaintiffs or complainants have stated a case for an accounting. I am even a little doubtful about that, and if the case were at a point where that were necessary, I would certainly require him to recast his pleadings and state in short, concise words, what sort of an accounting he wants, what sort of an accounting has not taken place, so that we could see what it is.

"I am perfectly convinced, and I think perhaps in fairness to all of you I ought to say so, that there is no invalidity in this contract, and that there is no lacking of power in the comptroller or conservator to make it; and under the circumstances disclosed by the pleadings, by the petition and complaint here, apparently, according to his own pleading, after a reading of the contract, it was not an unwarranted action under the facts. The bank was closed.

"And, I say, of course, as far as I can see, there is no cause of action, no fact upon which relief could be granted

to recover for the taking over of good will. None of the facts here are sufficient to show that the National Bank is obligated to pay the First National Bank something because former directors of the First National Bank came onto the Board of the new bank, or because the conservator deposited funds and checked them out of the new bank, or because it rented the quarters of the old bank and occupied them and paid the rent.

"I find nothing in these pleadings that would warrant any such assertion that that amounted to a buying or agreeing to pay for, even by implication, of any such item as good will of a closed bank.

"I am rather inclined to think that the complaint is sufficient to disclose an accounting called for and a charge that no accounting within the terms of the contract has been made.

"And the rule is, of course, that if there is any relief sought to which the complainant is entitled, why, the motion to dismiss cannot prevail. And, at least, if it were granted upon that basis, leave to amend or requirement of a more definite statement of his claim would be proper.

"It illustrates, I think, very forcefully, the value of the rule that before a depositor or shareholder undertakes to do the litigating that rests upon the Receiver to do in case it is meritorious, he should be required to present his facts and demand that the Receiver do that.

"That rule is of value not only because it is the only way that meritorious litigation can be carried on, but it is a means of preventing a lot of useless and burdensome litigation, burdensome to the courts and to all parties, when a preliminary investigation of the facts upon demand of the Receiver might disclose that it was utterly without basis, especially when a depositor or a shareholder bases most of his allegations on information rather than upon fact.

"He comes in here and says, 'On information, I charge that so and so and so and so.'

"Now, if he presented that information to the Receiver in advance, it is at least possible that the Receiver could dissipate any misinformation that he might have.

"I think to take any action that would result in whittling away that rule would be very dangerous and a very serious matter.

"My idea is that for the present this case must be dismissed for failure of the complainants to make appropriate demand in advance of undertaking to usurp the position of the Receiver.

"And you may prepare an order accordingly.

"I will take no action on the motion to dismiss for lack of sufficiency of statement, except to indicate to you what I said. Maybe a better pleading on another action might put them in a better position to call for an accounting. And, at any rate, one dismissal is enough at a time.

"You may prepare the order, gentlemen."